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IN THE
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Institutional Religious Freedom Alliance ("IRFA") is a national, nonpartisan, and multi-faith association of faith-based organizations ("FBOs"). IRFA works to protect the religious freedom of faith-based service organizations by educating the public, training organizations and their lawyers, creating policy alternatives that better protect religious freedom, and advocating such policy alternatives to the Executive Branch and Congress. IRFA's members and allies include charities, child-welfare organizations, schools, colleges, organizations that defend religious freedom, churches, and denominational agencies. IRFA seeks to ensure that FBOs can continue to make their distinctive contributions to the public good, and it equips organizations to adopt best practices that protect their religious rights.

This case has far-reaching implications for the FBOs that IRFA serves. These FBOs provide a diverse range of social services, including services to indigent and other at-risk populations, services to children, and health services. The Eighth Circuit's rule threatens to marginalize them by permitting States to discriminate against them in the provision

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[1] Counsel for Petitioner has filed, with the Clerk of this Court, blanket consent to the filing of *amicus curiae* briefs. In addition, counsel for Respondent has consented in writing to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

of public funding. This rule demeans religious practitioners and FBOs by singling out their religiously motivated social programs as uniquely unworthy of governmental support. In addition, this rule reduces the services FBOs can afford to provide and the number of individuals they can afford to serve, which, in turn, harms society more broadly.

SUMMARY OF ARGUMENT

Those who exercise religion, and their religiously motivated practices, enjoy special constitutional protection against "unequal treatment." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993). The State of Missouri disregarded this first principle when it funded the playground resurfacing of a less-qualified secular applicant instead of a more-qualified religious applicant simply because the latter was religiously affiliated. If this Court sanctioned such religious discrimination, it would hobble numerous FBOs that, prompted by the faith that inspires and shapes their operations, provide essential social services to their communities. This hobbling, in turn, would harm those whom they serve.

I. Excluding FBOs from public grants imperils the broad range of services that such organizations provide to their communities. Motivated by diverse religious callings, people of faith often band together to form and operate FBOs that deliver social services to the poor, sick, and neglected. FBOs' work includes everything from prisoner-reentry programs to housing for abused women, from soup kitchens to hospitals, and from schools to crime-prevention programs.

When civic duty and religious calling converge, governments and FBOs mutually benefit by partnering to help those in need. By offering grants to both secular and religious entities, on equal terms, governments can leverage civil society's full armament of private institutions to fight poverty, disease, addiction, and other ills. Although partnerships between governments and FBOs encompass the full range of social services, three major categories, highlighted below, are exemplary: services to the poor and other at-risk populations, services to children, and health services.

If this Court endorsed Missouri's effort to cut off FBOs from government funding, FBOs would have fewer resources to deploy in their faith-motivated efforts to help their neighbors. And this, in turn, would send harmful ripples throughout society. Removing state funding from FBOs "not only suffocates social and religious pluralism by creating a monolithic, secular-dominated structure for the delivery of welfare services," but also "eliminates a fuller range of provider choices for the poor and needy." Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 285, 290 (1999).

II. Such exclusion of FBOs from otherwise neutral public grants not only demeans and handicaps religious practices but also undermines the secular purposes for the grants, contrary to the Free Exercise Clause.

First, when a government excludes FBOs from public grants because of their faith, it demeans religious practitioners and belittles their faith-based

practices. The "indignity of being singled out for special burdens on the basis of one's religious calling is . . . profound." *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting). Applying the general language of other provisions of the Constitution, this Court has acknowledged that racial and gender discrimination stigmatize and demean. Under the Free Exercise Clause, religious discrimination is at least no different. Discriminatory exclusion of FBOs thus runs afoul of the principle that "no person may be restricted or demeaned by government in exercising his or her religion." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring).

Second, when a government excludes FBOs from grant programs, it also handicaps religious practice, because religiously motivated conduct—namely, running social services programs for reasons of faith—suffers from reduced funding. Time and again, this Court has held that First Amendment rights are threatened when the government forces religious adherents to choose between violating their religious beliefs and suffering economic consequences. Yet Missouri has imposed this impermissible choice on in-state FBOs: Institutions must either tear out their religious hearts or hobble themselves financially in being able to serve their communities—while secular organizations that provide the same services benefit comparatively.

Third, when the government refuses to make grants available on equal terms to secular and religious institutions, it undermines the secular goals for its grant programs. This case is a vivid illustration: Missouri's grant program seeks to

promote playground safety. The State made fourteen grants, and it ranked Trinity Lutheran as the fifth-best applicant. But because the State excluded Trinity Lutheran due to its religious affiliation, grant money instead flowed to the fifteenth-ranked applicant (a secular institution). By the State's own lights, it provided money to an inferior applicant—and, therefore, advanced its goal of playground safety less effectively—simply because it did not want to fund a *religious* institution's playground.

ARGUMENT

I. EXCLUDING FAITH-BASED ORGANIZATIONS FROM GRANTS IMPERILS THE WIDE ARRAY OF SERVICES SUCH ORGANIZATIONS PROVIDE TO THEIR COMMUNITIES.

Throughout American history, "religion has been a powerful force, capable of producing immense and transformative social change." Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 Emory L.J. 19, 19 (2006). To produce this social change, people of faith frequently have united to operate FBOs that provide social services to the poor, ill, and oppressed. *See, e.g.*, Judith B. Goodman, *Charitable Choice: The Ramifications of Government Funding for Faith-Based Health Care Services*, 26 Nova L. Rev. 563, 571–72 (2002) (hereinafter "*Charitable Choice*"). FBOs' work has included prisoner-reentry programs, housing for abused women, soup kitchens, hospitals, schools, youth programs, and crime-prevention programs. FBOs have provided these "works of mercy, love, peace, and justice, with and without government money, because of a divine mandate." *Id.* at 604.

Today, FBOs continue to "play a large and vital role in the provision of social services" because they are well-positioned to serve their communities. Robert W. Carter, Jr., *Faith-Based Initiatives: Expanding Government Collaboration with Faith-Based Social Service Providers*, 27 Seton Hall Legis. J. 305, 309–10 (2003). Although many social service providers "are often too bureaucratic, inflexible, and impersonal to meet the acute and complex needs of the poor," "faith-based and community organizations . . . are close to the needs of people and trusted by those who hurt."[2] As a result, FBOs frequently can "gather information" that will aid clients and can be "more easily accessible to clients than other providers." Carter, *supra*, at 309–10.

Governments at every level—local, state, and federal—have goals that overlap with those of FBOs. As a result, "[p]artnerships between government and religiously affiliated entities have deep roots in the United States." Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1, 5 (2005) (hereinafter "*Faith-Based Initiative*"); *see also* Ian Bartrum, *The Constitutional Structure of Disestablishment*, 2 NYU J.L. & Liberty 311, 344–45 (2007) ("Government funding of religious charities is not a new idea."). In the mid-1800s, "both Protestant and Catholic institutions received aid for programs to help orphans, alcoholics, juvenile delinquents, and the mentally ill." *Id.* at 344–45. As the need for these charities grew more

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[2] President George W. Bush, Rallying the Armies of Compassion, http://tinyurl.com/hr2wbkg.

acute due to "widening gaps in state social services," churches, with the help of government funding, "gradually built an infrastructure of support organizations" to provide the necessary services. *Id.*

In the modern era, even as government agencies have gained "a near monopoly over the resources available for social welfare spending," they have continued to incorporate and depend on FBOs in the provision of social services. Esbeck, *supra*, at 290. Such partnerships rest on the principle that "our call as people of faith" and "our duty as citizens of America" can "bring us together to feed the hungry and comfort the afflicted; to make peace where there is strife and rebuild what has broken; [and] to lift up those who have fallen on hard times."[3] When civic duties and religious convictions align, then, it is no surprise that governments and FBOs cooperate.[4]

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[3] Remarks of President Barack Obama: National Prayer Breakfast, Feb. 5, 2009, http://tinyurl.com/jfho4ew.

[4] In the examples below, *amicus* emphasizes state funding from Arizona, Colorado, Florida, Illinois, Michigan, Minnesota, Nevada, Pennsylvania, Virginia, and Washington, all of which have "mini-Blaine amendments," which prohibit state funding "in aid of," "for the benefit of," or for the "support" of religious institutions (or, in Nevada's case, state funding for a "sectarian purpose"). *See* ARIZ. CONST. art. II, § 12; COLO. CONST. art. IX, § 7; FLA. CONST. art I, § 3; ILL. CONST. art. X, § 3; MICH. CONST. art. I, § 4; MINN. CONST. art I, § 16; NEV. CONST. art. XI, § 10; PA. CONST. art. 3, § 29; VA. CONST. art. IV, § 16; WASH. CONST. art. I, § 11. Unlike Missouri, these States acknowledge that financial support to FBOs may advance shared goals without advancing religion. *See, e.g., Center for Inquiry, Inc. v. Jones*, No. 2007-CA-1358, at *14 (Fla. Cir. Ct. Jan. 20, 2016) (unpublished judgment), http://tinyurl.com/zltdejb (holding that

Partnerships between governments and FBOs span the full range of social services. This brief highlights three major categories to illustrate the types of programs that would suffer from the exclusion of religious entities from government funding: (1) services to the poor and other at-risk populations, (2) services to children, and (3) health services.

Services to the Poor and Other At-Risk Populations

When governments aid the indigent and other at-risk populations, they often find it "useful to contract for social services with organizations like Catholic Charities, Lutheran Social Services, and Jewish Family Services," all of which "have religious identities . . . but . . . do not engage in practices of worship or religious training." *Faith-Based Initiative*, *supra*, at 5. Catholic Charities USA, for example, among the largest charities in America, offers nearly $4 billion in charitable services to approximately 8.7 million people each year. [5] Catholic Charities strives to "witness the love of

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(continued...)

a contract with a religious organization violates Florida's mini-Blaine Amendment *only* if, "in addition to providing social services, the government-funded program . . . also advance[s] religion"). If this Court upheld the Eighth Circuit's rule, however, such States would be particularly at risk of categorically excluding FBOs from public grants, by applying their mini-Blaine amendments.

[5] FORBES, The 50 Largest U.S. Charities, http://goo.gl/mzXFFm; CATHOLIC CHARITIES, The Catholic Charities Network, https://goo.gl/CyPE1g.

Christ by helping people in need and by serving their communities."[6] To fulfill its mission, it provides a broad array of social services, including, among other things, disaster relief, emergency housing, counseling services, job training, services to immigrants, and meals for seniors and the homeless.[7] For example, in addition to offering immigrants its "full spectrum of community services," Catholic Charities seeks to help them "by providing interpretation, employment training, job placement and counseling services" and by offering "legal . . . services to clients with family-based cases and with applications for legal residence, deferred action for childhood arrivals, and citizenship."[8] Last year, it served 400,000 refugees and immigrants, who, with this critical assistance, found "homes and jobs," "learn[ed] how to speak English and how to navigate our American systems," went "to school, launch[ed] businesses, buil[t] assets and bec[a]me contributing citizens."[9]

Because state governments also seek to fight poverty and serve at-risk populations, many partner with Catholic Charities and fund some of its operations. In Colorado, for example, Catholic Charities receives funding from at least six county departments, as well as the Colorado Department of

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[6] CATHOLIC CHARITIES, Home, https://goo.gl/KHlSKr.

[7] CATHOLIC CHARITIES USA, What We Do, https://goo.gl/ZrH1qJ.

[8] CATHOLIC CHARITIES USA, Welcoming Newcomers, https://goo.gl/Hu41s5.

[9] *Id.*

Health and Human Services.[10] The State recently awarded Catholic Charities of Central Colorado a $70,000 grant to help it "expand services to families in a 10-county region of Colorado."[11] The funds will support more than twenty-five programs, including aid to homeless families, financial literacy classes, counseling efforts, a soup kitchen, an English-as-a-Second-Language class, and other childhood education efforts.[12]

Many States have awarded similar grants to Catholic Charities. In 2009, Illinois granted Catholic Charities $7 million for its social services programs.[13] Nevada recently awarded Catholic Charities nearly $2 million to expand its food delivery program to 5,000 needy families in rural communities throughout the State.[14] Each year in Pennsylvania, state and county grants enable Catholic Charities for the Diocese of Allentown to support approximately 1,000 veterans who are homeless or at risk of homelessness, by "helping

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[10] *See* CATHOLIC CHARITIES: DIOCESE OF PUEBLO, FAQs, http://goo.gl/H5aEn2.

[11] Amy Gillentine Sweet, *Catholic Charities Receives Grant*, THE COLORADO SPRINGS BUSINESS JOURNAL (Mar. 17, 2016), http://goo.gl/IeHEd8.

[12] *See id.*

[13] Robert Becker & Ray Long, *Church-State Debate: Religious Groups Slated for Illinois Grants*, CHICAGO TRIBUNE (Oct. 13, 2009), http://goo.gl/WqfT3f.

[14] *See* Paul Nelson, *Catholic Charities to Expand Service to Rural Nevada* (June 4, 2015), http://goo.gl/51JyGT.

[them] secure housing and employment" and providing "help with rent, utilities, moving expenses, emergency support, transportation and child care."[15] In addition, the Arizona Department of Veterans Services awarded Catholic Charities a $41,250 grant for a similar program.[16]

As another example, the Salvation Army provided $2.8 billion in charitable services in 2014.[17] "[A]n evangelical part of the universal Christian Church," the Salvation Army's "mission is to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination."[18] To do so, it "serves 60 million meals . . . through its many soup kitchens, sit-down meal programs, food pantries, mobile meals and community gardens."[19] It also runs "[g]roup homes, emergency shelters, and transitional living centers [that] provide housing, food, and overnight lodging," as well as "educational, counseling and vocational services to homeless, destitute individuals

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[15] PENNSYLVANIA CATHOLIC CONFERENCE, Supportive Services for Veteran Families, Nov. 7, 2014, http://goo.gl/Uwo3RF. Catholic Charities for the Diocese of Erie, Pennsylvania, reports that state and local governments provided nearly 12% of its annual revenue in 2014. *See* CATHOLIC CHARITIES: DIOCESE OF ERIE, 2014 Annual Report, http://goo.gl/ecydqD.

[16] *See* ARIZONA DEPARTMENT OF VETERANS' SERVICES, Arizona Veterans' Donation Fund, https://goo.gl/9gGWPn.

[17] THE SALVATION ARMY, 2014 Financial Summary: Expenses, http://goo.gl/1RbUaw.

[18] THE SALVATION ARMY, Mission Statement, http://goo.gl/Eupy4O.

[19] THE SALVATION ARMY, Hunger Relief, http://goo.gl/uj16od.

and families, and youth where family care is undesirable or unavailable."[20]

State funding supports many of these programs. Illinois, for example, provided nearly $120,000 in grants to the Salvation Army for its homeless shelter and other social-service programs in 2014, and another $40,000 in 2015.[21] In Florida, the Board of County Commissioners funded the Salvation Army's Emergency Bridge Housing Program and "ensure[d] sufficient housing . . . , case management and bus passes [were] available to homeless men, women and children in unincorporated regions" of the State.[22]

States have also funded Habitat for Humanity, an ecumenical Christian organization "dedicated to eliminating substandard housing and homelessness."[23] For example, the Michigan State Housing Development Authority recently provided

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[20] THE SALVATION ARMY, Housing and Homeless Services, http://goo.gl/uURRRN. Additionally, the Texas Muslim Women's Foundation annually "provides assistance to hundreds of families . . . faced with crisis," particularly to victims of domestic abuse. TEXAS MUSLIM WOMEN'S FOUNDATION, Social Services, http://goo.gl/Cy7pIF. With the help of federal funding, this organization provides short-term financial assistance, food, shelter, and basic needs, transitional housing, and crisis counseling. *See id.*; U.S. GOVERNMENT, Recipient Profile: Texas Muslim Women's Foundation, https://goo.gl/6VZmhJ.

[21] *See* Sharon Woods Harris, *State Budget Forces Salvation Army Campaign Hike*, PEKIN DAILY TIMES (Oct. 26, 2015), http://goo.gl/9UOao0.

[22] THE SALVATION ARMY: TAMPA, Grants, http://goo.gl/uKPHG1.

[23] HABITAT FOR HUMANITY, Christian Ministry, http://goo.gl/tjXtJW.

Habitat for Humanity with "$825,000 in funding to help more than 60 families move closer to owning their own homes."[24]

Services to Children

FBOs also provide countless services to children. The Young Men's Christian Association ("YMCA"), for example, seeks to build strong communities through youth development programs.[25] Its "mission is to put Christian principles into practice through programs that build healthy spirit, mind and body for all."[26]

Several States provide funding for these efforts. The Washington Department of Commerce awarded $2 million to the Gordon Family YMCA as part of the State's Building Communities Fund grant program.[27] The State earmarked these funds for constructing a facility to house "an aquatics center, wellness areas, multiple gyms, arts and teen centers, youth and teen programs and a community room."[28] Pennsylvania provided a $1 million grant to the Greater Johnstown Community YMCA to update existing facilities and "move th[e] community to a better place

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[24] Associated Press, *Habitat for Humanity of Michigan Getting $825,000 Grant*, CLICK ON DETROIT (Feb. 19, 2016), http://goo.gl/hdh5ie.

[25] *See* YMCA, Our Focus, http://www.ymca.net/our-focus.

[26] YMCA, Home, http://www.ymca.net/.

[27] Kari Plog, *Sumner YMCA Receives $2 Million as Part of State Budget Deal*, THE NEWS TRIBUNE (July 2, 2015), http://goo.gl/KHff1a.

[28] *Id.*

for the youth, the adults, families, senior citizens and vulnerable populations."[29]

State funding may also be earmarked for specific YMCA programs that impact youth. For example, the Michigan Department of Community Health awarded the YMCA a $400,000 grant to support its programs throughout the State.[30] $50,000 of this grant went to facilities in the Lansing area to support "work to teach children healthy habits and address childhood obesity through physical activity and before/after school and summer programming."[31]

The Inner-City Muslim Action Network similarly works to "empower[] local youth through leadership development and civic engagement."[32] Through its Youth Council, the Network trains "dynamic youth leaders" who "gain more knowledge and experience," "hone effective communication skills," and develop strategic campaigns in three key areas: "Food Access, Juvenile Justice, and Youth Employment."[33] In recognition of these valuable contributions, Illinois

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[29] Justin Dennis, *$1M State Grant Boosts YMCA Facility Upgrades*, THE TRIBUNE-DEMOCRAT (Oct. 2, 2014), http://goo.gl/H7nzXe.

[30] Michelle Rahl, *YMCA of Lansing Receives State Grant to Teach Children Healthy Lifestyles*, LANSING REGIONAL CHAMBER (Oct. 30, 2014), http://goo.gl/n7DG3w.

[31] *Id.*

[32] INNER-CITY MUSLIM ACTION NETWORK, About Us, http://goo.gl/Cb3aF4.

[33] INNER-CITY MUSLIM ACTION NETWORK, Youth Services, http://goo.gl/RzXA3T.

and the City of Chicago provide funding for the Network's programs.[34]

States also provide funding to various religious schools. In Pennsylvania, for instance, religious schools receive millions of dollars in state funding.[35] The State paid two hundred Catholic schools in the Philadelphia region nearly $9 million for schoolbooks and supplies.[36] New York similarly supports religious schools.[37] And, in 2009, Illinois's construction program provided "more than 100 grants to religious organizations," including "$100,000 to Telshe Yeshiva school . . . for renovations; $700,000 to St. Malachy School for capital improvements; and $750,000 to St. Anthony W.W. Temple for costs associated with capital

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[34] INNER-CITY MUSLIM ACTION NETWORK, Some of Our Funders, http://goo.gl/IpQhi5.

[35] *See* Susan Snyder, *Pa. Budget Crunch Squeezes Catholic Schools* (Oct. 12, 2015), http://goo.gl/Jxw9rF.

[36] *See id.*; Amy Hill, *Catholic Agencies Glad for Break in Pa. Budget Impasse* (Dec. 30, 2015), http://goo.gl/YMv9ce (noting that funding for religious schools and other private schools would be used to purchase "textbooks, materials, equipment and services that support [students'] secular education").

[37] NEW YORK STATE CATHOLIC CONFERENCE, *State Budget Agreement Increases Funding for Catholic Schools* (Mar. 25, 2013), http://goo.gl/PcSfPT. New York also has a mini-Blaine amendment, but, unlike the provisions cited in footnote 4, it bars funding "in aid . . . of" religious schools, not religious institutions generally. *See* N.Y. CONST. art. XI, § 3.

improvements."[38]

Finally, many States support programs for prisoners' children. Amachi, a Christian entity, is a prime example. It strives to break the cycle of intergenerational criminal behavior and incarceration by providing prisoners' children with "the consistent presence of loving, caring people of faith." [39] When Amachi proved successful in Philadelphia, the Pennsylvania Department of Community and Economic Development granted it funds "to provide training . . . and to encourage [other] states to create dedicated funding for mentoring-children-of-prisoners programs."[40] As a result, some twenty States committed to the Amachi program.[41]

In Texas, Amachi teamed with Big Brothers Big Sisters Lone Star.[42] The joint program relies on contributions from the Governor's office, the OneStar Foundation, and the Texas Department of Criminal Justice.[43] It began with a $3.7 million grant from

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[38] Robert Becker & Ray Long, *Church-State Debate: Religious Groups Slated for Illinois Grants*, CHICAGO TRIBUNE (Oct. 13, 2009), http://goo.gl/WqfT3f.

[39] AMACHI, About Us, http://goo.gl/iQKo0k.

[40] Thomas J. Smith, *The Least of These: Amachi and the Children of Prisoners*, at 11, http://goo.gl/gYpdPC.

[41] *See id.*

[42] AMACHI, Home, http://goo.gl/tvXju6.

[43] *See* Traci Shurley, *Somebody to Lean On Program Gives Guidance to Children of Inmates*, THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, https://goo.gl/wTXjXq.

Texas.[44] Texas also provided a $300,000 grant in 2006, a $500,000 two-year grant in 2007, and another $500,000 two-year grant in 2009.[45] The program has connected hundreds of children with "role models from all walks of life, but particularly those from local religious organizations."[46] And its success depends, at least in part, on "[h]ouses of worship and their members," which "are able to provide a safe, stable environment for children to develop into responsible young men and women."[47]

Health Services

"[T]here is a long history of government funding going to church hospitals . . . starting at the turn of the [twentieth] century." *Charitable Choice*, *supra*, at 586. "Traditional religious providers, whether Catholic, Jewish, Methodist, or Baptist, all have long and successful hospital traditions." *Id.* at 590. "Among religious hospitals," though, "Catholic hospitals have predominated." Michael J. DeBoer, *Religious Hospitals and the Federal Community Benefit Standard—Counting Religious Purpose as a Tax-Exemption Factor for Hospitals*, 42 Seton Hall L. Rev. 1549, 1556 (2012). In 2009, there were over 600 Catholic hospitals in the United States, and "eleven of the forty largest hospital systems in the United States [were] Catholic." *Id.* at 1556–67. Sixteen

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[44] *See id.*

[45] Thomas J. Smith, *supra*, at 12.

[46] BIG BROTHERS BIG SISTERS, Amachi Texas, http://goo.gl/QkpzXJ.

[47] *Id.*

percent of all patients admitted to hospitals that year were admitted to hospitals affiliated with the Catholic Church, and, when taken together, such hospitals "make up the largest private nonprofit health-care system in the nation." *Id.* at 1557.

Religious hospitals regularly receive state funding. The Minnesota Department of Health, for example, "provide[s] funds to non-profit organizations promoting healthy pregnancy outcomes and assisting pregnant and parenting women in developing and maintaining family stability and self-sufficiency."[48] FBOs are eligible for this funding and "may use their facilities to provide grant funded services without removing or altering religious art, icons, scriptures, or other symbols from these facilities."[49] Colorado also provides financial support to religious hospitals.[50]

Florida provides similar funding for FBOs' drug rehabilitation efforts.[51] Following a "competitive public procurement process," the Florida Department of Corrections awarded contracts to Lamb of God Ministries and Prisoners of Christ, FBOs that provide substance-abuse programs to recently

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[48] MINNESOTA DEPARTMENT OF HEALTH, Positive Alternatives Overview, http://goo.gl/uu9wPT.

[49] MINNESOTA DEPARTMENT OF HEALTH, Positive Alternatives Application Questions, http://goo.gl/xN7ac2.

[50] *See, e.g.*, NATIONAL JEWISH HEALTH, 2015 Annual Report, https://goo.gl/xa2wnn.

[51] *See Center for Inquiry*, No. 2007-CA-1358, at *2.

released prisoners.[52] The Department has found that the optional faith components of such rehabilitation programs are "effective for offenders who wish to integrate their faith with their recovery."[53] As such, it has renewed contracts with these FBOs for more than ten years and annually funds between 20% and 33% of their operations.[54]

Moreover, the Virginia Department of Behavioral Health and Developmental Services recently granted United Methodist Family Services ("UMFS") more than $800,000 "to improve 'systems of care' for children with mental illness and their families."[55] UMFS "do[es] whatever it takes to empower high-risk children, their families and communities throughout Virginia," including by "addressing behavioral and emotional issues [and] finding foster homes."[56] The grant supports training efforts and has allowed UMFS to hire six parent-support partners.[57]

The Virginia Department of Social Services has

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[52] *Id.* at 5–6.

[53] *Id.* at 10.

[54] *Id.* at 11–12.

[55] Tammie Smith, *Methodist Family Services Initiative Helps Children with Behavioral Health Issues*, RICHMOND TIMES-DISPATCH (Aug. 14, 2014), http://goo.gl/i0p4Ie.

[56] UNITED METHODIST FAMILY SERVICES, Home, https://www.umfs.org/.

[57] Tammie Smith, *supra*.

provided similar funding to UMFS.[58] In 2009, for example, it contracted with UMFS to help youth "transition[] out of foster care statewide."[59] It later expanded on that contract and provided an additional $125,000 to UMFS to help support families who adopted children from other countries.[60]

* * *

When a state withdraws funding from FBOs such as the ones discussed above, it has wide-ranging consequences. The remainder of this brief explores these detrimental and unconstitutional effects.

II. EXCLUDING FAITH-BASED ORGANIZATIONS FROM OTHERWISE NEUTRAL GRANTS NOT ONLY DEMEANS AND HANDICAPS RELIGIOUS PRACTICE BUT ALSO UNDERMINES THE GRANTS' SECULAR PURPOSES.

One way to abridge the free exercise of religion is to subject religious practitioners and their religious practices to "unequal treatment." *Lukumi*, 508 U.S. at 532, 542; *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in the judgment). That the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543. The unequal treatment here—the exclusion of

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[58] *See* VIRGINIA DEP'T OF SOCIAL SERVICES, Annual Progress Report, https://goo.gl/UKRSxI.

[59] *See id.* at 26.

[60] *See id.* at 14.

FBOs from otherwise neutral public grants—has at least three harmful effects that undermine its constitutionality.

First, excluding FBOs from public grant programs demeans religious practitioners and belittles their faith-based practices. In *Lukumi*, for instance, this Court emphasized that discrimination against religiously motivated conduct improperly "*devalues* religious reasons" for a practice "by judging them to be of lesser import than nonreligious reasons." *Id.* at 537–38 (emphasis added). Such discrimination is "demoralizing and stigmatic." Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 29, 35 (1976); *see, e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (noting, in a case involving a gender-based classification, that discrimination can "stigmatiz[e] members of the disfavored group as 'innately inferior'"). Discriminatory exclusion of FBOs therefore contravenes the rule that "no person may be restricted or demeaned by government in exercising his or her religion." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

"The indignity of being singled out for special burdens on the basis of one's religious calling is . . . profound." *Locke*, 540 U.S. at 731 (Scalia, J., dissenting). As such, the "concrete harm produced [by such discrimination] can never be dismissed as insubstantial." *Id.* This Court "has not required proof of 'substantial' concrete harm with other forms of discrimination, and it should not do so here." *Id.* (internal citations omitted); *see* Brest, *supra*, at 9 ("Recognition of the stigmatic injury inflicted by discrimination explains applications of the

antidiscrimination principle where the material harm seems slight . . . .").

What the express terms of the Free Exercise Clause require with respect to religious practice is confirmed by this Court's jurisprudence under more general constitutional protections. Consider precedent involving racial discrimination. In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court held that segregated educational systems deprive racial minorities of equal protection, "even though the physical facilities and other 'tangible' factors may be equal," because of the demeaning and stigmatizing effect of discrimination. *Id.* at 493–95. Separating children "from others of similar age and qualifications solely because of their race," the Court explained, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

So too for sex discrimination. Differential treatment of potential jurors based on their sex "is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.'" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994). Such discrimination "denigrates the dignity of the excluded juror" and sends a "message . . . that certain individuals, for no reason other than gender, are presumed unqualified." *Id.*; *see also Heckler*, 465 U.S. at 739 (describing stigmatic harm in the context of gender discrimination).

In short, discrimination is demeaning. And because the "free exercise" of religion is "essential in preserving [the] dignity" of people of faith, *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring),

discriminatory treatment of FBOs tramples the dignity of religious adherents who provide social services through FBOs.

Second, the exclusion of FBOs from grant programs handicaps religious practice. As discussed above, FBOs provide an array of social services due to the religious convictions of those who run the organizations. Many FBOs, for example, motivated by the biblical injunction to "give[] . . . food to the hungry and provide[] clothing for the naked," operate homeless shelters that provide food and clothing to those in need. Ezekiel 18:7. When the government excludes such organizations from grant programs merely because they are religious, it "burdens . . . conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543.

In particular, the resulting decrease in funding to FBOs encumbers religiously motivated conduct—namely, the provision of social services for reasons of faith. The government threatens First Amendment rights when it thus forces religious adherents to choose between violating their religious beliefs or suffering economic consequences. In *Rosenberger v. Rector and Visitors of the U. of Va.*, for instance, this Court held that excluding a student organization from certain funding—merely because the organization was religious—violated the First Amendment. 515 U.S. 819, 822–23, 837 (1995). Moreover, when "Orthodox Jewish merchants" who closed their stores on Saturday for religious reasons contended that "requiring them to remain shut on Sunday threatened them with financial ruin," this Court "entertained their claim" under the Free Exercise Clause. *Hobby Lobby*, 134 S. Ct. at 2767

(discussing *Braunfeld v. Brown*, 366 U.S. 599 (1961)). More recently, this Court held that imposing significant "economic consequences" on those who will not abandon their religious beliefs about contraception "amount[s] to a substantial burden." *Id.* at 2759, 2775; *see also Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."); *Sherbert v. Verner*, 374 U.S. 398, 399, 403–04, 410 (1963) (forcing employee to forgo wages or violate religious convictions violated Free Exercise Clause).

Moreover, the *relative* impact of such a religious exclusion exacerbates this harm suffered by FBOs. When the government denies FBOs the ability to "compet[e] on an equal footing in [their] quest for a benefit," secular organizations that provide the same services receive a leg up and become relatively more likely to flourish. *See Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666–67 (1993) (holding that a race-based denial of the ability "to compete on an equal footing in the bidding process" for government contracts constitutes injury in fact); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211–12 (1995) (same). When the government plays favorites in this manner, it improperly places faith-based social services providers at a disadvantage relative to nonreligious entities that perform identical services.

The government cannot impose such an unequal burden absent a compelling, nondiscriminatory justification, which the State of Missouri lacks here.

This Court has made clear that, when evaluating a claim that a government has infringed religious freedom, it is important to compare the effect that a policy has on religious persons to the effect that same policy has on nonreligious persons. In *Braunfeld*, this Court evaluated the Free Exercise claim brought by Orthodox Jewish merchants who claimed that a ban on Sunday sales infringed their religious rights because it would cause them "substantial economic loss, to the benefit of their non-Sabbitarian competitors." 366 U.S. at 601–02 (plurality); *see also id.* at 522 (opinion of Frankfurter, J.) (analyzing "the disadvantage wrought by the nonexempting Sunday statutes"). Although the claim failed on the merits, the Court considered the relative impact of the law on religious persons, as compared to the effect the law had on nonreligious persons. *See id.* at 605–06, 608–09 (plurality opinion); *id.* at 610–11, 613 (Brennan, J., concurring in part and dissenting in part).

The Court underscored the same point in *Hobby Lobby*. One contention in that case was that stiff penalties on companies that did not provide health insurance (including contraceptives) imposed no burden at all, because the companies could "readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges." 134 S. Ct. at 2776. The Court rejected this argument, largely because companies that eliminated a health-insurance benefit "without offering additional compensation . . . would face a

competitive disadvantage in retaining and attracting skilled workers." *Id.* at 2776–77 (emphasis added).

Third, excluding FBOs from grant programs undermines the programs' secular purposes. Such purposes, which FBOs can and do assist the state in accomplishing, range from feeding the hungry and sheltering the homeless to promoting recovery from substance abuse and fostering healthy childhood development. To reduce the number of organizations able to benefit the needy via such programs, shrinking the "market," hardly advances the programs' secular purposes. Indeed, because FBOs such as those detailed above in Part I are often in a better position to achieve these goals, their exclusion flies in the face of the state's secular goals.

In this case, for example, the Missouri grant program aims to improve playground safety. Missouri, like all States, has scarce financial resources; therefore, it seeks to achieve this goal by funding the most qualified grant applicants.

Missouri received forty-four grant applications under its scrap tire program, and it made fourteen grants. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 782 (8th Cir. 2015). As the fifth-ranked grant applicant, Trinity Lutheran not only possessed the requisite qualifications but even surpassed two-thirds of the grantees. *See id.* But because the State excluded Trinity Lutheran for religious reasons, grant money flowed instead to the fifteenth-ranked applicant, simply because that less-qualified applicant was secular while the more-qualified applicant was religious. *See id.*

For a government to undermine its own secular purposes in this way is inconsistent with *Lukumi*. In that case, the ordinances were "underinclusive" because they sought to advance secular interests in promoting public health and preventing animal cruelty by restricting religiously motivated animal killing, while "fail[ing] to prohibit nonreligious conduct that endangers [the secular] interests in a similar or greater degree than [religious] sacrifice does." *Lukumi*, 508 U.S. at 543; *see also id.* at 546 ("The proffered objectives are not pursued with respect to analogous non-religious conduct . . . ."); *id.* at 578 (Blackmun, J., concurring in the judgment) (explaining that a state may not "create an underinclusive statute" that fails to restrict the "allegedly harmful conduct"). That is, the secular purposes in *Lukumi* were not materially advanced because the ordinances singled out "only conduct motivated by religious conviction" to "bear[] the weight of . . . governmental restrictions." *Id.* at 547.

Missouri's exclusion of FBOs from its scrap tire program suffers from a similar flaw. The City of Hialeah erred by singling out religiously motivated conduct when imposing a burden, even though the analogous secular conduct implicated the City's secular objectives to a similar or greater degree. Here, Missouri has singled out religiously motivated conduct when determining eligibility for a benefit, even though the excluded religious entity (Trinity Lutheran) would serve the State's secular objectives to a greater degree.

In fact, the State of Missouri's approach is more counterproductive than the policy in *Lukumi*. In *Lukumi*, the City's targeting of a religious

organization advanced its purported secular purpose to some extent, even though the City would have advanced that interest *even more* if it had evenhandedly applied its regulation to religious and nonreligious animal killings. Here, however, the State of Missouri's exclusion of Trinity Lutheran *undercuts* the State's secular objective. Both the City of Hialeah and the State of Missouri burdened religious exercise—but only Missouri, in doing so, was *at the same time* undermining its secular purpose.

An example from Florida confirms that the exclusion of FBOs from public grants undercuts secular objectives. Florida allows "private organizations, including faith-based ones, to bid on contracts to provide substance abuse and transitional housing services" to recently released convicts. *Center for Inquiry*, No. 2007-CA-1358, at *5. The State's secular goals are "criminal rehabilitation, the successful reintegration of offenders into the community, and the reduction of recidivism," particularly "criminal recidivism associated with and exacerbated by drug addiction." *Id.* at 16–17. After a competitive bidding process, the State awarded contracts to two FBOs, and it has renewed those contracts for more than a decade. *See id.* at 5–6. The State could not purchase the services provided by the FBOs—food, shelter, clothing, substance-abuse counseling, transportation, medical and dental services, and education—"as cheaply from other sources because the amounts paid [did] not even cover the [FBOs'] overhead." *Id.* at 9. The FBOs "provide[d] these services at a loss" and "continue[d] to house, feed, and provide services to

State clients when the State funds run short." *Id.* at 11.

If Florida had adopted Missouri's approach—that is, denying funding to FBOs due to their religious nature—the State would have been required to pay more for the needed services. *See id.* at 9. The exclusion would have undermined the State's secular goals because, in the absence of the partnership with FBOs, the State's funds would have reached fewer criminals in need of rehabilitation, reintegrated a smaller number of recently released offenders, and left a greater percentage of drug-addicted offenders without the support needed to prevent future criminal activity. Moreover, excluding FBOs would have diminished the impact of the State's funding, given that some prisoners are more likely to respond positively to programs that "integrate their faith with their recovery." *See id.* at 10.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the Eighth Circuit's decision should be reversed.

Respectfully submitted,

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